APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11735-G

JEAN CARLO FERREIRA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Jean Carlo Ferreira, a federal prisoner currently serving a total life sentence for various offenses, seeks a certificate of appealability ("COA"), to appeal the dismissal of his 28 U.S.C. § 2255 motion. In his motion, he asserted that his 18 U.S.C. § 924(c) conviction was invalid because it may have been predicated on his conviction for hostage taking, which did not qualify as a crime of violence under § 924(c), in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that § 924(c)'s residual clause was unconstitutionally vague).

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate (1) whether the

petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (quotation marks omitted). A procedural default may be excused, however, if the movant shows (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted. *See id.*

In *Granda v. United States*, this Court held that a § 2255 movant's challenge under *Davis* was procedurally defaulted because he could not show cause or actual prejudice. 990 F.3d 1272, 1286-92 (11th Cir. 2021). This Court determined that the movant could not establish prejudice to overcome his procedural default, given that he could not show a substantial likelihood that the jury solely relied on an invalid § 924(c) predicate offense. *Id.* at 1288-89. Further, this Court concluded that the movant could not make a showing of actual innocence because the predicate offenses were inextricably intertwined. *Id.* at 1292 (quotation marks and alterations omitted).

As an initial matter, Mr. Ferreira has filed a motion for a COA in this Court, raising, for the first time, an argument that the jury did not rely on the correct jury instruction when it convicted him of § 924(c). Accordingly, he has waived this argument by failing to raise it before the district court. *See Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1273 n.1 (11th Cir. 2014).

Here, reasonable jurists would not debate the district court's determination that Mr. Ferreira's *Davis* claim was procedurally defaulted, as he did not establish cause and prejudice, or actual innocence, to excuse his default. This claim was procedurally defaulted because Mr. Ferreira failed to raise it on direct appeal. *See McKay*, 657 F.3d at 1196. Thus, Mr. Ferreira must

establish cause and prejudice, or a fundamental miscarriage of justice to excuse the default. *See id.*

Even if Mr. Ferreira could show cause, he cannot establish actual prejudice. The jury instructions allowed the jury to find Mr. Ferreira guilty of his § 924(c) offense based on his codefendant Ewin Oscar Martinez's conduct in furtherance of the conspiracy to commit hostage taking and carjacking. Moreover, Mr. Martinez carried a firearm while hiding inside the parking garage before the carjacking, and he committed the carjacking in order to take the victims hostage. The record also shows that one of the victims saw the guns in the house where he was held captive, and two guns were recovered from the house after the victims were rescued. Under these circumstances, Mr. Ferreira could not show that a substantial likelihood that the jury solely relied on his conviction for hostage taking when it found him guilty of the § 924(c) offense. *See Granda*, 990 F.3d at 1288-89.

Further, Mr. Ferreira has not presented new, reliable evidence demonstrating that he is factually innocent of the crimes for which he was convicted, as his *Davis* claim would establish only his legal innocence, rather than his factual innocence. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995); *McKay*, 657 F.3d at 1197. Additionally, like the movant in *Granda*, his carjacking and hostage taking offenses were inextricably intertwined, and both offenses arose from the same scheme that resulted in Mr. Ferreira's codefendants taking the victims hostage. *See Granda*, 990 F.3d at 1292. Therefore, Mr. Ferreira could not make a showing of actual innocence to excuse his procedural default. Accordingly, his motion for a COA is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 08, 2021

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-11735-G
Case Style: Jean Ferreira v. USA, et al
District Court Docket No: 1:20-cv-21500-JAL
Secondary Case Number: 1:00-cr-00001-JAL-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G
Phone #: 404-335-6172

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21500-CIV-LENARD
(Criminal Case No. 00-00001-Cr-Lenard)

JEAN CARLO FERREIRA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255 (D.E. 8), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on Movant Jean Carlo Ferreira's Motion to Vacate Pursuant to 28 U.S.C. § 2255, ("Motion," D.E. 8),[1] filed June 12, 2020. The Government filed a Response on July 6, 2020, ("Response," D.E. 12), to which Movant filed a Reply on July 17, 2020, ("Reply," D.E. 21). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

[1] The Court will cite docket entries in this civil case as "(D.E. [#])," and will cite docket entries in the underlying criminal case as "Cr-D.E. [#])."

I. Background

a. Criminal proceedings[2]

On December 13, 1999, after six months of planning surveillance, Ewin Oscar Martinez ("Martinez"), Pedro Rafael Caraballo Martinez ("Caraballo Martinez"), and Edgar Alexander Torrealba, abducted Christine Aragao and her two sons, nine-year-old Alceau, Jr. ("Junior") and one-year-old Alexander ("Baby Alex"), in the parking garage of the Oceania Tower Condominium in Sunny Isles, Florida, where the Aragaos lived. Mrs. Aragao was severely beaten in her face and shocked repeatedly with a stun gun, causing her to drop Baby Alex to the floor of the garage. Junior was also shocked with the stun gun in his head and neck, and was burned as a result. The Aragaos were then forced into one of the family's cars, a Lincoln Navigator to which the attackers had previously obtained the keys, and driven to a house in North Miami, Florida that Movant Juan Carlo Ferreria had rented using a false name.

Inside the house, the attackers tied Mrs. Aragao's hands and legs to a chair and placed her in a closet. They did the same to Junior and placed him in a different closet. The baby was kept in another room. The next day, Mrs. Aragao and Junior were removed from the closet and required to stay in shuttered rooms. Mrs. Aragao was permitted to care for the baby, but because her arm was still numb from the electric shocks, she was unable

[2] Unless otherwise indicated, the facts contained in this section are taken from the Eleventh Circuit's opinion on direct appeal, United States v. Ferreira, 275 F.3d 1020, 1023 (11th Cir. 2001), and this Court's Order denying Movant's first 2255 Motion, Ferreira v. United States, Case No. 03-20997-Civ-Lenard, Order Denying 2255 Motion (D.E. 18) at 3-6 (S.D. Fla. July 23, 2004).

to lift or change him. When their captors left the house, Mrs. Aragao and Junior once again were tied to chairs and put into closets. At night, Junior was forced to sleep in his underwear in a bed with Martinez.

The Aragaos were held captive in the North Miami house for four and one-half days. During that time, Mrs. Aragao was required to use her cellular phone to make a series of calls to her husband, a successful businessman, requesting that he meet with Martinez. Each time, Martinez dictated what she was to say. When the phone calls did not result in a meeting, Martinez required Mrs. Aragao to type a letter that he dictated requesting a meeting with Mr. Aragao. The letter was mailed to Ipanema Enterprises, the company owned by Mr. Aragao.

By tracing one of the cellular phone calls, the FBI was able to locate the house at which the Aragaos were being held captive, and the family was rescued on the morning of December 18, 1999. Martinez and Caraballo–Martinez were arrested at that time. Among other evidence in the house, the police found a torn letter addressed to Mr. Aragao in a trash can. When reconstructed, the letter stated that if Mr. Aragao did not turn over all of his money, he and his family would be killed. An identical letter was found in a file on Martinez's laptop computer.

At trial, Mrs. Aragao and Junior identified Martinez and Caraballo–Martinez as two of the three men who abducted them. Movant Ferreira was not identified as the third abductor.[3] Rather, he was the parking lot attendant at the Aragao's condominium and had

[3] Edgar Alexander Torrealba was the third abductor. See United States v. Torrealba, 339 F.3d 1238, 1239-40 (11th Cir. 2003).

provided the abductors the keys to the Aragao's Lincoln Navigator. Additionally, Junior testified that Movant had asked him about the family's plans for the evening of the abduction. Telephone records showed that during the time the Aragao's were held captive, a cellular phone registered to Ferreira made twenty-two calls to a cellular phone registered to Martinez and found in the North Miami house.

On February 3, 2000, a Grand Jury sitting in the Southern District of Florida returned a Superseding Indictment charging Movant with the following offenses:

- Count One: Conspiracy to commit hostage taking, 18 U.S.C. § 1203(a);
- Count Two: Hostage taking, 18 U.S.C. § 1203(a);
- Count Three: Conspiracy to commit carjacking, 18 U.S.C. §§ 2119(2) & 371;
- Count Four: Carjacking, 18 U.S.C. § 2119(2) and 2; and
- Count Five: Using and carrying a firearm during crimes of violence, 18 U.S.C. § 924(c) and 2, and specifically "violations of Title 18 United States Code, Sections 1203(a) and 2119(2), as set forth in Counts Two and Four" of the Superseding Indictment.[4]

United States v. Martinez, Case No. 00-00001-Cr-Lenard, Superseding Indictment (Cr-D.E. 25).

During trial, the Government presented evidence that Martinez carried a silver-colored pistol into the parking garage and placed it on the wheel of the car he was hiding

[4] The Superseding Indictment also contained a Count Six which charged Martinez with possession of child pornography, (Cr-D.E. 25 at 5-6), but the Government ultimately dismissed that Count with leave of the Court, (Cr-D.E. 201).

behind. (Trial Tr., Cr-D.E. 229-1 at 74:18-20, 75:3-4.) After forcing the Aragaos into the Lincoln Navigator, Martinez retrieved the firearm from the wheel he had placed it on, got into the Navigator's driver's seat, and drove away. (Id. at 78:22-24.) Junior testified that he saw two silver guns at the house the Aragaos were being held captive in. (Id. at 11:5-8.) FBI Agent Scott Hahn testified that after rescuing the Aragaos, the FBI recovered two guns from that house. (Trial Tr., Cr-D.E. 224-1 at 55:24-57:11.)

After the close of evidence, the case was submitted to the jury. The Court's jury instructions on Count Five included the following:

> Title 18, United States Code, Section 924(c)(1), makes it a separate Federal crime or offense for anyone to use or carry a firearm during and in relation to a crime of violence.
>
> A Defendant can be found guilty of that offense as charged in Count Five of the indictment only if all of the following facts are proved beyond a reasonable doubt:
>
> First: That the Defendant committed the crime of violence charged in Counts Two or Four of the indictment.
>
> Second: That during and in relation to the commission of that offense the Defendant used or carried a firearm, as charged; and
>
> Third: That the Defendant used or carried the firearm knowingly.
>
> . . .
>
> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.
>
> A person who knowingly has direct physical control of something is then in actual possession of it.

> A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.
>
> If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.
>
> Whenever the word "possession" has been used in these instructions it includes constructive as well as actual possession, and also joint as well as sole possession.
>
> Under 18 United States Code § 2 the guilt of a Defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting together with, or under the direction of, another person or persons in a joint effort.
>
> So, if the acts of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had engaged in such conduct.
>
> However, before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime or even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.
>
> In some instances a conspirator may be held responsible under the law for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.
>
> So, in this case, with regard to Count Five, and insofar as the Defendants Jean Carlo Ferreira and Pedro Rafael Caraballo-Martinez are concerned, respectively, if you have first found either of those Defendants guilty of either of the conspiracy offenses charged in Counts One or Three

of the indictment, you may also find such Defendant guilty of any of the offense charged in Count Five even though such Defendant did not personally participate in such offense if you find, beyond a reasonable doubt:

First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;

Second: That the Defendant under consideration was a knowing and willful member of the conspiracy at the time of the commission of such offense;

Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

(Cr-D.E. 126 at 21-25.)

On June 2, 2000, the jury returned a general verdict finding Movant guilty of Counts One through Five of the Superseding Indictment. (Cr-D.E. 127.)

On September 1, 2000, the Court entered Judgment sentencing Movant to a total term of life imprisonment, consisting of terms of life imprisonment as to Counts One and Two, respectively, sixty months' imprisonment as to Count Three, and 300 months' imprisonment as to Count Four, all to run concurrently, plus a term of sixty months' imprisonment as to Count Five, to run consecutively with the sentences imposed as to Counts One through Four. (Judgment, Cr-D.E. 191 at 3.) Movant appealed, and the Eleventh Circuit affirmed his convictions and sentences in a published opinion. United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001). Mandate issued July 5, 2002. (Cr-D.E. 259.)

Following his conviction, Movant filed a Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582, (Cr-D.E. 258), which the Court denied, (Cr-D.E. 273). Movant

appealed, (Cr-D.E. 274), and the Eleventh Circuit affirmed the Court's order, (Cr-D.E. 293).

b. First Motion under 28 U.S.C. § 2255

On April 24, 2003, Movant filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Cr-D.E. 267), which was assigned Case No. 03-20997-Civ-Lenard. On July 22, 2004, the Court entered an Order denying Movant's First 2255 Motion and denying a certificate of appealability. Ferreira v. United States, Case No. 03-20997-Civ-Lenard, D.E. 18 (S.D. Fla. July 23, 2004). Movant petitioned the Eleventh Circuit Court of Appeals for a certificate of appealability, but the Eleventh Circuit dismissed the petition, id., D.E. 31 (S.D. Fla. Apr. 11, 2005). The Eleventh Circuit subsequently denied Movant's motion for reconsideration. Id., D.E. 32 (S.D. Fla. June 1, 2005).

c. United States v. Davis and the instant Motion

As previously discussed, Movant was adjudicated guilty in Count Five of using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c), with the predicate "crimes of violence" being the hostage taking offense charged in Count Two and the carjacking offense charged in Count Four. (Superseding Indictment, Cr-D.E. 25.) As used in Section 924(c), "crime of violence" means:

an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsection (A) is commonly referred to as the "elements" (or "force" or "use-of-force") clause, while subsection (B) is commonly referred to as the "residual" clause. See Solomon v. United States, 911 F.3d 1356, 1358 (11th Cir. 2019).

In United States v. Davis, the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. __ U.S. __, 139 S. Ct. 2319, 2336 (2019).

On or about March 30, 2020, Movant applied to the Eleventh Circuit Court of Appeals for leave to file a second or successive 2255 Motion, asserting that the Supreme Court's decision in Davis invalidated his conviction in Count Five for using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). (See D.E. 1 at 9.) On April 7, 2020, the Eleventh Circuit granted Movant's application, finding that Movant had made "a prima facie showing that his claim satisfies the statutory criteria of § 2255(h)(2) on the basis that his § 924(c) conviction may be unconstitutional under Davis, as he potentially was sentenced under the now-invalid residual clause of § 924(c)(3)." (Id. at 7 (citing In re Cannon, 931 F.3d 1236, 1243-45 (11th Cir. 2019); 28 U.S.C. § 2255(h)(2)).) Specifically, it observed:

> Although Ferreira argues otherwise, carjacking qualifies as a predicate offense under § 924(c)(3)'s elements clause, which remains valid after Davis. In re Smith, 829 F.3d 1276, 1280-81 (11th Cir. 2016) (holding that carjacking qualifies as a crime of violence under 924(c)(3)'s elements clause regardless of the validity of the residual clause). However, we have not determined whether hostage taking, the other predicate offense, is a crime of violence under § 924(c)(3)'s elements clause.

(Id. at 7.)

On April 10, 2020, the Court entered an Order appointing Attorney Philip Horowitz to represent Movant in these proceedings. (D.E. 4.) On June 12, 2020, Movant, through

counsel, filed the instant Section 2255 Motion. (D.E. 8.) The Government filed a Response, (D.E. 12), to which Movant filed an Amended Reply, (D.E. 21).

Thereafter, Movant filed three Notices of Supplemental Authority citing cases from the Southern District of Florida for the proposition that hostage taking is not a crime of violence under Section 924(c). (D.E. 22 (citing Robles Velasquez v. United States, No. 20-22081-Civ-Bloom, D.E. 11 (S.D. Fla. Sept. 1, 2020)); D.E. 23 (citing Palacio v. United States, Case No. 19-24090-Civ-Huck, D.E. 13 (S.D. Fla. Aug. 11, 2020)); D.E. 24 (citing Torres v. United States, Case No. 19-25150-Civ-Huck, D.E. 13 (S.D. Fla. Sept. 30, 2020)).)

On October 22, 2020, the Government filed a Response to the third Notice of Supplemental Authority, arguing that Movant's reliance on Torres "is plainly wrong . . . ." (D.E. 26.) On November 1, 2020, Movant filed a Reply. (D.E. 28.)

d. Co-defendant Martinez's successive 2255 Motion under Davis

Meanwhile, the Eleventh Circuit also granted co-defendant Ewin Oscar Martinez's petition for leave to file a successive 2255 Motion to assert a Davis claim.[5] See Martinez v. United States, 19-23455-Civ-Lenard, D.E. 1 (S.D. Fla. Aug. 16, 2019). Relevant here, Martinez argued that that the Supreme Court's decision in Davis invalidated his Section 924(c) conviction in Count Five. Id., D.E. 16 at 5-6. Specifically, he argued that because the jury returned a general verdict it is unclear whether the jury found the 924(c) charge predicated on carjacking or hostage taking; the Court must apply the "categorical

[5] The Eleventh Circuit also granted co-Defendant Pedro Rafael Caraballo-Martinez's petition for leave to file a successive 2255 Motion to assert a Davis claim. See Caraballo-Martinez v. United States, 20-22282-Civ-Lenard, D.E. 1 (S.D. Fla. June 1, 2020).

approach" and presume that the 924(c) conviction was predicated solely on the underlying hostage taking offense (rather than the carjacking offense); and hostage taking is not a "crime of violence" under Section 924(c)'s elements clause. Id.

On January 27, 2020, the Court entered an Order denying Martinez's successive 2255 Motion on the merits. Id., D.E. 29.

Martinez appealed, and on April 21, 2021, the Eleventh Circuit issued an Opinion affirming the Court's judgment. Martinez v. United States, __ F. App'x __, 2021 WL 1561593 (11th Cir. 2021). First, the Eleventh Circuit found that Martinez had procedurally defaulted his Davis claim because he did not argue that Section 924(c)'s residual clause is unconstitutionally vague at trial or on direct appeal. Id. at *2. It further found that Martinez could not satisfy the "cause and prejudice" exception to the procedural default rule:

> The district court instructed the jury that it could convict under § 924(c) if he used a firearm in connection with either the hostage taking or the carjacking. The jury found beyond a reasonable doubt that Martinez committed the carjacking, which is a qualifying predicate under § 924(c)'s still-valid elements clause. See In re Smith, 829 F.3d 1276, 1280–81 (11th Cir. 2016). Though the general jury verdict did not specify which predicate offense Martinez's § 924(c) conviction was based on, the record shows that the two crimes were factually bound up. Martinez committed the carjacking in order to put the family inside the car and hold them hostage. And he carried a firearm when he hid in the parking garage and when he drove the family's car away. So Martinez cannot show that the jury relied solely on the hostage-taking offense to convict under § 924(c); it is just as likely that the jury relied on the carjacking conviction to find that he possessed a firearm in furtherance of a crime of violence. Granda, 990 F.3d at 1289–91.
>
> Martinez contends that a jury could not have found that he used the firearm in furtherance of the carjacking offense because he took the keys to the car from the valet stand without a struggle. But the carjacking conviction required the jury to find that Martinez took the vehicle by force and violence. See 18 U.S.C. § 2119. And we are not at liberty to question that conviction. See United States v. Jordan, 429 F.3d 1032, 1035 (11th Cir. 2005) ("The law

> of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case."). So because the jury necessarily found that Martinez took the vehicle by force and violence, and because the record shows that Martinez carried a firearm while waiting in the parking garage and while driving the car away after violently forcing its owner inside, it is at least possible that the jury concluded he possessed a firearm in furtherance of the carjacking. Granda, 990 F.3d at 1289–91.

Id. at *3. The Eleventh Circuit further found that Martinez could not satisfy the "actual innocence" exception to the procedural default rule:

> To demonstrate actual innocence of his § 924(c) offense, Martinez must show that no reasonable juror could have concluded that he possessed a firearm in furtherance of the carjacking. Id. Martinez cannot make this showing; because the carjacking and hostage taking were part of the same scheme, a reasonable juror could have concluded that he used the firearm in furtherance of both crimes. So because Martinez cannot show cause and prejudice or actual innocence, he cannot overcome the procedural default of his Davis claim.

Id. Finally, the Eleventh Circuit found that even if Martinez's Davis claim was not procedurally defaulted, "the inextricability of the alternative predicate crimes convinces us that the error Martinez complains about—instructing the jury on a constitutionally-invalid predicate as one of two potential alternative predicates—was harmless." Id. at *4.

> The available record does not provoke grave doubt about whether Martinez's § 924(c) conviction rested on an invalid ground. As we already explained, the hostage taking was inextricably intertwined with the carjacking. If the jury found that Martinez possessed a firearm in furtherance of the hostage taking, it would be reasonable for it to also conclude that he possessed the firearm in furtherance of the carjacking—a crime it found him guilty of beyond a reasonable doubt. And because we cannot say that the inclusion of the invalid predicate had a "substantial influence" in determining the jury' s verdict, any error in instructing the jury on the potentially invalid predicate was harmless. Granda, 990 F.3d at 1293.

Id.

III. Legal Standard

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed the sentence to vacate, set aside, or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See United States v. Jordan, 915 F.2d 622, 625 (11th Cir. 1990). However, "[a] second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain" either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

The Court of Appeals' determination is limited. See Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that the court of appeals' determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination). If the Court of Appeals' authorizes the applicant to file a second or successive 2255 Motion, "'[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, de novo.'" In re Moss, 703 F.3d

1301, 1303 (11th Cir. 2013) (quoting Jordan, 485 F.3d at 1358). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." Id. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

IV. Discussion

Movant argues that pursuant to Davis, his conviction in Count Five for using or carrying a firearm during a crime of violence must be vacated. (D.E. 8.) He argues that because the jury returned a general verdict as to Count Five, it is unclear whether that conviction was predicated on the hostage-taking offense charged in Count Two or the carjacking offense charged in Count Four. (See id. at 7.) He argues that although carjacking qualifies as a predicate "crime of violence" under Section 924(c)(3)'s elements clause, hostage taking does not, and the Government has conceded as much in the Eleventh Circuit Court of Appeals. (Id. at 7-10 (citing United States v. Hernandez, Case No. 18-10334, Replacement Brief for the United States (11th Cir. July 1, 2020)).) He argues that pursuant to Stromberg v. California, 283 U.S. 359 (1931), because his conviction for Count Five may have rested on a constitutionally invalid offense—i.e., "the unconstitutional hostage taking predicate"—his conviction for Count Five is invalid and the Court must set aside his conviction and sentence for Count Five. (Id. at 10, 12-14 (citations omitted).) He further argues that "his claim is also supported by the law regarding duplicitous

indictments, as well as prohibitions against judicial fact-finding, as outlined in In re Gomez, Alleyne v. United States, Shepard v. United States, and Moncrieffe v. Holder." (Id. at 10; see also id. at 14-19.) As to the duplicitous indictment and the improper judicial fact-finding allegations, Ferreira references In re Gomez, 830 F.3d 1225 (11th Cir. 2016) and Alleyne v. United States, 570 U.S. 99 (2013). (Id. at 14–16.) He cites Shepard v. United States, 544 U.S. 13 (2005) and Moncrieffe v. Holder, 569 U.S. 184 (2013) in support of his argument that, in the absence of a clear determination of the predicate that was relied upon, this Court "must assume that he was convicted of the least serious one," which he argues is substantive hostage taking. (Id. at 16–17.) Finally, he discusses United States v. Jones, 935 F.3d 266 (5th Cir. 2019).

In its Response, the Government argues that Movant's Davis claim is procedurally defaulted, and he cannot overcome the procedural default by showing either (1) cause and prejudice, or (2) actual innocence. (D.E. 12 at 13-22.) It further argues that even if Movant's claim was not procedurally defaulted, it fails on the merits because carjacking remains a valid 924(c) predicate under the elements clause, (id. at 22-23), and Movant has not shown a likelihood that the jury based its verdict in Count Five solely on the hostage taking predicate, (id. at 23).[6] It argues that the Court should apply the framework discussed in In re Cannon, 931 F.3d at 1236, 1243-44 (11th Cir. 2019), and find that under the facts of this case, "the predicates of carjacking and hostage taking were so inextricably intertwined that it is difficult to see how a jury would have convicted Ferreira of the 924(c)

[6] The Government does not argue that hostage taking qualifies as a crime of violence under Section 924(c)'s elements clause. (See Resp. at 2.)

count predicated only on the hostage taking, without also finding him guilty of the 924(c) count predicated on the carjacking." (Id. at 26.) "In fact, the jury found him guilty beyond a reasonable doubt of both predicate offenses. These crimes were all intertwined and were all committed as a part of one scheme to collect money. Ferreira cannot show otherwise." (Id.) The Government further argues that Movant "wholly misapplies the categorical approach." (Id. at 27.) It further argues that even if Movant "could show that his Section 924(c) conviction was based solely on the residual clause (which he cannot), he still would not be entitled to relief unless he could meet the heightened standard in Brecht[v. Abrahamson, 507 U.S. 619, 623 (1993)]—which operates in this case as an additional barrier to Section 2255 relief." (Id. at 29.) It further argues that the Supreme Court's decision in Hedgpeth v. Pulido, 555 U.S. 57, 60 (2008) effectively nullifies Movant's argument based on Stromberg. (Id. at 30-31.) Finally, the Government argues that Alleyne is inapposite. (Id. at 32.)

In his Reply, Movant argues that his claim is not procedurally defaulted because he is actually innocent of Count Five, (D.E. 21 at 1-2), and, alternatively, he has established cause to excuse the default and prejudice resulting from the default, (id. at 2-5). He further maintains that his Davis claim is meritorious for the reasons discussed in his Motion, asserting that the Court must apply the categorical approach to the 924(c) offense and find that the jury based his conviction for Count 5 on the least culpable predicate which, he argues, is hostage taking. (Id. at 5-14.)

The problem with Movant's arguments is that the Eleventh Circuit recently rejected all of them in Granda v. United States, 990 F.3d 1272 (2021), and found that co-Defendant

Ewin Oscar Martinez's virtually identical Davis claim failed under the Granda framework, Martinez, __ F. App'x __, 2021 WL 1561593 (11th Cir. 2021). Pursuant to Granda and Martinez, the Court finds that Movant's Davis claim is procedurally defaulted, and even if it was not procedurally defaulted any error was harmless. Therefore, he is not entitled to relief under 28 U.S.C. § 2255.

a. 28 U.S.C. § 2255(h)

As a threshold matter, the Court must determine de novo whether Movant has carried his burden under 28 U.S.C. § 2255(h) of showing that he is entitled to file a second or successive 2255 Motion. See In re Moss, 703 F.3d at 1303 (quoting Jordan, 485 F.3d at 1358). As relevant here, the Court must determine whether Movant's Motion contains a claim involving "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

As previously stated, in Davis the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336. The Eleventh Circuit has held that (1) Davis announced a new substantive rule of constitutional law, and (2) the rule in Davis was made retroactive to cases on collateral review by the Supreme Court. In re Hammoud, 931 F.3d 1032, 1038-39 (11th Cir. 2019). Specifically,

> [B]y striking down § 924(c)(3)(B)'s residual clause, Davis altered the range of conduct and the class of persons that the § 924(c) statute can punish in the same manner that Johnson[v. United States, __ U.S. __,135 S. Ct. 2551 (2015)] affected the ACCA [Armed Career Criminal Act]. In other words, Davis announced a new substantive rule, and Welch[v. United States, 136 S. Ct. 1257 (2016)] tells us that a new rule such as the one announced in Davis applies retroactively to criminal cases that became final before the new substantive rule was announced. Consequently, for purposes of § 2255(h)(2), we conclude that, taken together, the Supreme Court's holdings in Davis and Welch "necessarily dictate" that Davis has been "made" retroactively applicable to criminal cases that became final before Davis was announced.

Id. Because Movant's Motion contains a claim involving a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, the Court finds that Movant is entitled to file a second or successive 2255 Motion challenging his Section 924(c) conviction under Davis.

b. Procedural default

First, because Movant did not argue to the trial court or on direct appeal that his Section 924(c) conviction was invalid because Section 924(c)(3)(B)'s residual clause is unconstitutionally vague, his Davis claim is procedurally defaulted. Granda, 990 F.3d at 1285-92 (finding that because the movant failed to advance his conviction under Section 924(o), which criminalizes conspiring to use or carry a firearm during a drug trafficking crime or crime of violence under Section 924(c), he procedurally defaulted his Davis claim) (citing Fordham v. United States, 706 F.3d 1345, 1349 (11th Cir. 2013)). Therefore, he "cannot succeed on collateral review unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the § 924[(c)] conviction." Id. at 1286.

1. Cause and Prejudice

A. Cause

With respect to "cause" to excuse the default, Movant argues that his vagueness challenge to Section 924(c)'s residual clause was so novel that it was not reasonably available to him on direct appeal. (Reply at 2-4.) He argues that "[o]nce the legal tools to

present a constitutional challenge to his §924(c) conviction became available to him, Mr. Ferreira diligently raised such a challenge by timely raising the instant §2255 motion within one year of Davis." (Id. at 4.)

In Granda, the Eleventh Circuit explicitly rejected this argument. 990 F.3d at 1286-88. Citing cases dating back to 1986 in which defendants asserted vagueness challenges to Section 924(c), the Eleventh Circuit concluded that "[t]he tools existed to challenge" Section 924(c)(3)(B)'s residual clause on the movant's direct appeal. Id. at 1288. Here, too, the tools existed to challenge Section 924(c)(3)(B)'s residual clause on Movant's direct appeal. See id. As such, Movant cannot show cause to excuse his procedural default. Id. See also Martinez, 2021 WL 1561593, at *2 (observing that Davis "was not a 'sufficiently clear break with the past' such that an attorney would not reasonably have had the tools necessary to present the claim before that decision") (quoting Granda, 990 F.3d at 1286).

B. Prejudice

As to prejudice resulting from the default, Movant argues that "a constitutional error resulting in additional time in prison is necessarily prejudicial." (Reply at 4 (citing Glover v. United States, 537 U.S. 198, 203 (2001)).)

"To prevail on a cause and prejudice theory, a petitioner must show actual prejudice. Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Fordham, 706 F.3d at 1350 (alteration accepted) (internal quotation marks and citation omitted). The actual prejudice standard is "more stringent than the plain error standard." Parks v. United States, 832 F.2d 1244, 1245 (11th

Cir. 1987) (internal quotation marks omitted). The "ultimate inquiry" is: "Did the intrusion affect the jury's deliberations and thereby its verdict?" Ward v. Hall, 592 F.3d 1144, 1178–79 (11th Cir. 2010) (internal quotation marks and citation omitted).

Thus, it is not enough for Movant to show that the jury may have relied on the Count Two hostage-taking conviction as the predicate for his Count Five Section 924(c) conviction; Movant "must show at least a 'substantial likelihood,' see Ward, 592 F.3d at 1180, that the jury actually relied on the Count [Two] conviction to provide the predicate offense." Granda, 990 F.3d at 1288. "More specifically, he must establish a substantial likelihood that the jury relied only on the Count [Two] conviction, because reliance on [Count Four] would have provided a wholly independent, sufficient, and legally valid basis to convict on Count [Five]." Id.

Based on the record evidence and jury instructions, Movant cannot make the required showing. See Martinez, 2021 WL 1561593, at *3. The trial evidence established that Movant was the parking lot attendant at the Aragao's condominium and had provided the keys to the Aragao's Lincoln Navigator to the abductors. Additionally, Junior testified that Movant had asked him about the family's plans for the evening of the abduction. Telephone records showed that during the time the Aragao's were held captive, a cellular phone registered to Ferreira made twenty-two calls to a cellular phone registered to Martinez and found in the North Miami house.

The Court instructed the jury that it could convict Movant under Section 924(c) if he used or carried a firearm in connection with either the hostage taking or carjacking. (D.E. 126 at 21.) The Court further instructed the jury that pursuant to 18 U.S.C. § 2,

Movant could be found guilty of Count Five even if he did not personally participate in the offense:

> [I]f you have first found [Movant] guilty of either of the conspiracy offenses charged in Counts One or Three of the indictment, you may also find [Movant] guilty of any of the offense charged in Count Five even though [he] did not personally participate in such offense if you find, beyond a reasonable doubt:
>
> First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;
>
> Second: That the [Movant] was a knowing and willful member of the conspiracy at the time of the commission of such offense;
>
> Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

(Cr-D.E. 126 at 25.) The jury found beyond a reasonable doubt that Movant committed the carjacking, which is a qualifying predicate under Section 924(c)'s still-valid elements clause. See In re Smith, 829 F.3d 1276, 1280-81 (11th Cir. 2016). Although the general jury verdict did not specify which predicate offense Movant's Section 924(c) conviction was based on,

> the record shows that the two crimes were factually bound up. Martinez committed the carjacking in order to put the family inside the car and hold them hostage. And he carried a firearm when he hid in the parking garage and when he drove the family's car away. So Martinez cannot show that the jury relied solely on the hostage-taking offense to convict under § 924(c); it is just as likely that the jury relied on the carjacking conviction to find that he possessed a firearm in furtherance of a crime of violence. Granda, 990 F.3d at 1289–91.

Martinez, 2021 WL 1561593, at *3. Thus, because the jury instructions permitted the jury to convict Movant of Count Five based on Martinez's conduct, and the Eleventh Circuit has found that the hostage taking and carjacking offenses are "factually bound up"—or "inextricably intertwined," Granda, 990 F.3d at 1291—such that Martinez could not show that the jury relied solely on the hostage-taking offense when convicting him of Count Five, Movant is likewise unable to show that the jury convicted him under Section 924(c) solely on the hostage-taking offense; "it is just as likely that the jury relied on the carjacking conviction to find that he possessed a firearm in furtherance of a crime of violence." Martinez, 2021 WL 1561593, at *3 (citing Granda, 990 F.3d at 1289-91).

2. Actual innocence

Because Movant cannot establish both cause and prejudice, his only way around procedural default is by establishing actual innocence. "The actual innocence exception to the procedural default bar is 'exceedingly narrow in scope as it concerns a petitioner's actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence.'" Granda, 990 F.3d at 1292 (quoting Lynn v. United States, 365 F.3d 1225, 1235 n.18 (11th Cir. 2004)). To demonstrate actual innocence of the Section 924(c) offense, Movant would have to show that no reasonable juror would have concluded that he or his co-conspirators possessed a firearm in furtherance of the carjacking. Id. See also Martinez, 2021 WL 1561593, at *4.

Movant cannot make this showing; "because the carjacking and hostage taking were part of the same scheme, a reasonable juror could have concluded that [Martinez] used the firearm in furtherance of both crimes[,]" Martinez, 2021 WL 1561593, and the jury was

instructed that it could convict Movant on Count Five based upon Martinez's conduct, (Cr-D.E. 126 at 25).

Therefore, because Movant cannot show cause and prejudice or actual innocence, he cannot overcome the procedural default of his Davis claim. Granda, 990 F.3d at 1292. See also Parker v. United States, 993 F.3d 1257 (11th Cir. 2021); Martinez, 2021 WL 1561593, at *3.

c. Merits

Even if Movant could overcome the procedural default, "[t]he inextricability of the alternative predicate crimes convinces us that the error [Movant] complains about—instructing the jury on a constitutionally-invalid predicate as one of two potential alternative predicates—was harmless." Martinez, 2021 WL 1561593, at *4 (citing Granda, 990 F.3d at 1292).

"On collateral review, the harmless error standard mandates that 'relief is proper only if the . . . court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict. There must be more than a reasonable possibility that the error was harmful.'" Granda, 990 F.3d at 1292 (quoting Davis v. Ayala, 576 U.S. 257, 267–68 (2015), and citing Ross v. United States, 289 F.3d 677, 682 (11th Cir. 2002) (applying this standard to a § 2255 motion)). "Put another way, the court may order relief only if the error 'resulted in actual prejudice.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). The Brecht standard is not a burden of proof. Id. (citing O'Neal v. McAninch, 513 U.S. 432, 436, 438 (1995); McWilliams v. Comm'r, Ala. Dept' of Corr., 940 F.3d 1218, 1230 (11th Cir. 2019) (Jordan,

J., concurring in the judgment); Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1111 n.26 (11th Cir. 2012)). "Instead, the reviewing court should 'ask directly' whether the error substantially influenced the jury's decision." Id. (quoting O'Neal, 513 U.S. at 436). "[I]f if the court 'cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,' the court must conclude that the error was not harmless." Id. at 1293 (quoting Trepal, 684 F.3d at 1114 (quoting O'Neal, 513 U.S. at 437)).

The record does not provoke grave doubt about whether Movant's Section 924(c) conviction rested on an invalid ground. As previously explained, the Court instructed the jury that it could convict Movant of the 924(c) offense based upon Martinez's conduct. (D.E. 126 at 25.) And the Eleventh Circuit has found in this case:

> the hostage taking was inextricably intertwined with the carjacking. If the jury found that Martinez possessed a firearm in furtherance of the hostage taking, it would be reasonable for it to also conclude that he possessed the firearm in furtherance of the carjacking—a crime it found him guilty of beyond a reasonable doubt. And because we cannot say that the inclusion of the invalid predicate had a "substantial influence" in determining the jury's verdict, any error in instructing the jury on the potentially invalid predicate was harmless.

Martinez, 2021 WL 1561593, at *4. The jury also found Movant guilty of both hostage taking and carjacking beyond a reasonable doubt. Thus, if the jury found Movant possessed a firearm in furtherance of hostage taking, it would be reasonable for it to also conclude that he possessed the firearm in furtherance of the carjacking. See id. Because the Court cannot find that the inclusion of the invalid hostage taking predicate had a "substantial influence" in determining the jury's verdict, any error in instructing the jury

on the potentially invalid predicate was harmless. Id. See also Foster v. United States, __ F.3d __, 2021 WL 1742267, at *5-7 (11th Cir. 2021); Parker, 993 F.3d 1257; Granda, 990 F.3d at 1293.

Although Movant argues that pursuant to Stromberg v. California, 283 U.S. 359 (1931), the Court may not rely on the presence of an alternative, valid ground for conviction to conduct a harmless error analysis, the Eleventh Circuit explicitly rejected that argument in Granda. 990 F.3d at 1293-95. See also Foster, __ F.3d __, 2021 WL 1742267, at *6; Parker, 993 F.3d 1257.

Although Movant argues that "his claim is also supported by the law regarding duplicitous indictments, as well as prohibitions against judicial fact-finding, as outlined in In re Gomez, Alleyne v. United States, Shepard v. United States, and Moncrieffe v. Holder[,]" (Mot. at 10, 14-19), and asserts that the Court must apply the "categorical approach" to the Section 924(c) offense and presume that his conviction of Count Five was predicated on the least serious of the potential predicates, the Eleventh Circuit explicitly rejected that argument in Granda, 990 F.3d at 1295. See also Foster, __ F.3d __, 2021 WL 1742267, at *7; Parker, 993 F.3d 1257.

Although Movant argues that In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016) does not permit the Court to inquire as to which of several alternative predicates supplied the basis for a Section 924(c) conviction, the Eleventh Circuit explicitly rejected that argument in Granda, 990 F.3d at 1295. See also Foster, __ F.3d __, 2021 WL 1742267, at *7; Parker, 993 F.3d 1257.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant Jean Carlo Ferreira's Motion to Vacate Pursuant to 28 U.S.C. § 2255 is **DENIED**;
2. A Certificate of Appealability **SHALL NOT ISSUE**;
3. All pending Motions are **DENIED AS MOOT**; and
4. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 10th day of May, 2021.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21500-CIV-LENARD
(Criminal Case No. 00-00001-Cr-Lenard)

JEAN CARLO FERREIRA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Jean Carlo Ferreira's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** is hereby entered in favor of Respondent United States of America; and
2. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida this 10th day of May, 2021.

Joan A. Lenard
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

GOVERNMENT'S REQUESTED INSTRUCTION NO. 17

Pinkerton Instruction: [Pinkerton v. U. S., 328 U.S. 640 (1946)]

In some instances a conspirator may be held responsible under the law for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.

So, in this case, with regard to Count Five, and insofar as the Defendants Jean Carlo Ferreira and Pedro Rafael Caraballo-Martinez are concerned, respectively, if you have first found either of those Defendants guilty of either of the conspiracy offenses charged in Counts One or Three of the indictment, you may also find such Defendant guilty of any of the offense charged in Count Five even though such Defendant did not personally participate in such offense if you find, beyond a reasonable doubt:

First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;

Second: That the Defendant under consideration was a knowing and willful member of the conspiracy at the time of the commission of such offense; and

Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

Authority: Eleventh Circuit Pattern Jury Instructions (Criminal), Offense Instructions No. 11.5.

In some instances a conspirator may be held responsible under the law for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.

So, in this case, with regard to Count Five, and insofar as the Defendants Jean Carlo Ferreira and Pedro Rafael Caraballo-Martinez are concerned, respectively, if you have first found either of those Defendants guilty of either of the conspiracy offenses charged in Counts One or Three of the indictment, you may also find such Defendant guilty of any of the offense charged in Count Five even though such Defendant did not personally participate in such offense if you find, beyond a reasonable doubt:

First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;

Second: That the Defendant under consideration was a knowing and willful member of the conspiracy at the time of the commission of such offense; and

Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

APPENDIX "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 00-1-Cr-Lenard
Magistrate Judge Turnoff

UNITED STATES OF AMERICA,

v.

EWIN OSCAR MARTINEZ,
JEAN CARLO FERREIRA,
PEDRO RAFAEL CARABALLO-MARTINEZ.

_____/

JURY'S QUESTION TO THE COURT

On Page 25 of Jury Instructions – please provide us with a detailed explanation of item MARKED THIRD: That the commission of such offense by a co-conspirator was a Reasonably foreseeable consequence of the conspiracy.

Steve González
FOREPERSON

Date: 6/2/00
Time: 2:20pm

123/pr